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Bowring, Bill (2018) Russia and the Council of Europe: an incompatible ideology, and a transplanted legal regime? In: Morris, P.S. (ed.) Russian Discourses on International Law: Sociological and Philosophical Phenomenon. Abingdon, UK: Routledge. ISBN 9781138566705.

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Russian discourses on international law: Sociological and philosophical phenomenon

Edited by P. Sean Morris

Part III Ethical borders and transplantation of law and morals

Bill Bowring

Russia and the Council of Europe: an incompatible ideology, and a transplanted legal regime?

Introduction

Russia's accession to the Council of Europe (CoE) in 1996 and ratification of the European Convention on Human Rights (ECHR) in 1998 saw the beginning not only of a wholly new Russian discourse on international law, but also of an unprecedented immersion in it. It is no exaggeration to say that in the almost 20 years since ratification of the ECHR, Russian law and practice have become saturated with the principles and case-law emanating from Strasbourg. This remains the case whether or not Russia now "crashes out" of the COE as a result of sanctions suspending Russia's participation in the Parliamentary Assembly of the Council of Europe following the annexation of Crimea in 2014¹; and despite the Constitutional Court of the Russian Federation (CCRF) finding in two recent cases² that it was "impossible" for Russia to comply with judgments of the European Court of Human Rights (ECtHR).³ Whereas the USSR had ratified and engaged with United Nations human rights instruments, notably the key UN human rights covenants and conventions⁴, these never impinged on the USSR's sovereignty or the inviolable principle of non-interference in internal affairs, until, following a ruling of the USSR's Committee for Constitutional

¹ Russia may crash out of Council of Europe, says rights chief. If Russia keeps being excluded from the elections of key personnel at the Council of Europe, Moscow could leave the group. 9 April 2017.

<https://www.politico.eu/article/russia-may-crash-out-of-council-of-europe-says-rights-chief/>

² No. 12- II/2016, 19 April 2016; No. 1-II/2017 19 January 2017, and see

<https://rg.ru/2017/01/19/reg-szfo/konstitucionnyj-sud-rf-vynes-reshenie-po-delu-iukosa.html> (accessed on 26 December 2017)

³ *Anchugov and Gladkov v Russia*, on prisoners' voting rights, Applications nos. 11157/04 and 15162/05, judgment of 14 July 2013; *OAO Neftyanaya Kompaniya Yukos v. Russia*, application no. 14902/04, judgment (just satisfaction) of 31 July 2014.

⁴ Convention on the Prevention and Punishment of the Crime of Genocide, ratified by the USSR 3 May 1954; CERD - International Convention on the Elimination of All Forms of Racial Discrimination, ratified 4 Feb 1969; CCPR - International Covenant on Civil and Political Rights, ratified 16 Oct 1973; CESCR - International Covenant on Economic, Social and Cultural Rights, ratified 16 Oct 1973; CEDAW - Convention on the Elimination of All Forms of Discrimination against Women, ratified 23 Jan 1981; CAT - Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, ratified 3 Mar 1987; CRC - Convention on the Rights of the Child, ratified 16 Aug 1990. See

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=144&Lang=EN (accessed on 26 December 2017)

Supervision, on 1 October 1991, shortly before its demise just over a month later, the USSR accepted three individual complaints procedures⁵.

Relations between Russia and the CoE are now fraught as never before.⁶ It is my contention that whatever happens – and Russia is as always entirely unpredictable – this intense 20 year experience will leave its indelible mark on Russia and its discourses on international law.

Furthermore, I seek to show that ratification of the ECHR was never a question of transplantation, but of restoration of the “great legal reforms” of the 19th century.⁷

In this chapter my strategy is that I start with the uncontested empirical facts of the range of Russia’s commitments to and engagement to the CoE.

Second, I present and comment on Russia’s public statements as to its own perception of the significance of the CoE and its accession in 1996. These must of course be taken together with the deep engagement of the Russian judicial system with Strasbourg: the two Resolutions of the Supreme Court of the Russian Federation giving guidance to the Courts of General Jurisdiction, first the Resolution of 10 October 2003 ‘On application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation’⁸, and second the Resolution of 27 June 2013 ‘On application of the European Convention on Human Rights by the courts of general jurisdiction.’⁹ Russia, according to a number of official pronouncements, has every intention of remaining in the CoE, for good reasons.

Third, I return to the CoE and its post-WWII history. What is its ideology? Does it have one? Is it based on a view of “morals”? I show that two leading contemporary scholars, a political

⁵ CAT, Art.22 - Individual complaints procedure under the Convention against Torture; CCPR-OP1 - Optional Protocol to the International Covenant on Civil and Political Rights; CERD, Art.14 - Individual complaints procedure under the International Convention on the Elimination of All Forms of Racial Discrimination. http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=144&Lang=EN (accessed on 26 December 2017)

⁶ See Bill Bowring, “Russian cases in the ECtHR and the question of implementation” in Lauri Mälksoo and Wolfgang Benedek *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge, Cambridge University Press, 2017), pp.188-221

⁷ See Bill Bowring “The problem of ‘legal transplantation’ and human rights”, Chapter 11, pp.183-206 in *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Abingdon, Routledge, 2008)

⁸ Ruling of the Plenary session of the Supreme Court of the Russian Federation No 5 ‘On application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation’ 10 October 2003 at www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=6801 (accessed on 30 December 2017)

⁹ Ruling of the Plenary session of the Supreme Court of the Russian Federation No.21 ‘On Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Protocols thereto by the Courts of General Jurisdiction’ 27 June 2013. Available in English at www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=9155 (accessed on 30 December 2017)

scientist and an historian, have demonstrated, in a number of widely cited works, very different although convergent accounts of the origin and provenance of the CoE and ECtHR. My title has a question mark, for good reason. If there is doubt as to whether the CoE has a distinct and unmistakeable ideology, is Russia any less ambiguous? It is perfectly proper to ask the question - what is Russia's ideology? Indeed, Russian journals and mass media are full of scholarly and journalistic articles asking just these questions. My fourth section engages with the vexed question of legal transplants.

I conclude by insisting that Russia from its origins in the expanding Moscow of the 16th century has been an integral part of the European political and legal orders, influencing and influenced by all the diverse currents of thought and action. And if Russia now seeks to see itself as essentially Eurasian, then the Western European states, with, almost all of them, their histories of global colonial predation, have still to come to terms with their significance and legacy.¹⁰

Russia's engagement with the Council of Europe

Russia's most controversial and high-profile engagement with the CoE is, as indicated above its ratification of the ECHR and frequent appearance as a defendant in the ECtHR. However, Russia is deeply embedded in a wide range of CoE activities. In a chapter concerning ideology, it is perhaps best to start with hard empirical facts.

At the ceremony held in Strasbourg on February 28, 1996, to mark Russia's entry into the Council of Europe, the Russian Foreign Minister, Yevgeniy Primakov, handed over the documents affirming Russia's adherence to the Council's Charter.¹¹ He also signed the *European Convention on Human Rights*, the *European Convention Against Torture*, the *European Charter on Local Self-Government*, and the *Framework Convention on Protection of National Minorities*. I return to all of these below.

He did this pursuant to the obligations placed upon Russia in Parliamentary Assembly Opinion 193 (1996) of January 25, 1996¹², confirmed in Committee of Ministers Resolution No. 96/2.¹³ Paragraph 7 of the PACE Opinion set out 12 respects in which Russia was

¹⁰ Bill Bowring "Did the States Which Founded the UN Have Liberal or Illiberal Governments?" (2016) *Baltic Yearbook of International Law*, Volume 15 (2015), 31-44,

¹¹ This is taken from Chapter 8, "Human Rights in the Yeltsin Period", pp.140-173, in Bill Bowring *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Abingdon, Routledge, 2013), p.175 et seq

¹² <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=13932&lang=en> (accessed on 29 December 2017)

¹³ https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168062e4fa (accessed on 29 December 2017)

already seeking to conform with the fundamental principles of the Council of Europe (more precisely, as set out in Article 3 of the CoE Charter: “Every Member of the Council of Europe must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council....”)

Under paragraph 10 of its Opinion, the Parliamentary Assembly noted that “the Russian Federation shares fully its understanding and interpretation of the commitments entered into as spelt out in paragraph 7, and intends...” followed by a detailed list of 25 commitments.¹⁴

¹⁴ 10.1. to sign the European Convention on Human Rights at the moment of accession; to ratify the Convention and Protocols Nos. 1, 2, 4, 7 and 11 within a year; to recognise, pending the entry into force of Protocol No. 11, the right of individual application to the European Commission and the compulsory jurisdiction of the European Court (Articles 25 and 46 of the Convention);

10.2. to sign within one year and ratify within three years from the time of accession Protocol No. 6 to the European Convention on Human Rights on the abolition of the death penalty in time of peace, and to put into place a moratorium on executions with effect from the day of accession;

10.3. to sign and ratify within a year from the time of accession the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;

10.4. to sign and ratify within a year from the time of accession the European Framework Convention for the Protection of National Minorities; to conduct its policy towards minorities on the principles set forth in Assembly Recommendation 1201 (1993), and to incorporate these principles into the legal and administrative system and practice of the country;
Opinion 193 (1996)

10.5. to sign and ratify within a year from the time of accession the European Charter of Local Self-Government and the European Charter for Regional or Minority Languages; to study, with a view to ratification, the Council of Europe's Social Charter; and meanwhile to conduct its policy in accordance with the principles of these conventions;

10.6. to sign and ratify and meanwhile to apply the basic principles of other Council of Europe conventions - notably those on extradition; on mutual assistance in criminal matters; on the transfer of sentenced persons; and on the laundering, search, seizure and confiscation of the proceeds of crime;

10.7. to settle international as well as internal disputes by peaceful means (an obligation incumbent upon all member states of the Council of Europe), rejecting resolutely any forms of threats of force against its neighbours;

10.8. to settle outstanding international border disputes according to the principles of international law, abiding by the existing international treaties;

10.9. to ratify, within six months from the time of accession, the agreement of 21 October 1994 between the Russian and Moldovan Governments, and to continue the withdrawal of the 14th Army and its equipment from the territory of Moldova within a time-limit of three years from the date of signature of the agreement;

10.10. to fulfil its obligations under the Treaty on Conventional Armed Forces in Europe (CFE);

10.11. to denounce as wrong the concept of two different categories of foreign countries, whereby some are treated as a zone of special influence called the "near abroad";

10.12. to negotiate claims for the return of cultural property to other European countries on an ad hoc basis that differentiates between types of property (archives, works of art, buildings, etc.) and of ownership (public, private or institutional);

10.13. to return without delay the property of religious institutions;

10.14. to settle rapidly all issues related to the return of property claimed by Council of Europe member states, in particular the archives transferred to Moscow in 1945;

10.15. to cease to restrict - with immediate effect - international travel of persons aware of state secrets, with the exception of those restrictions which are generally accepted in Council of Europe member states, and to facilitate the consultation of archives kept in the Russian Federation;

10.16. to ensure that the application of the CIS Convention on Human Rights does not in any way interfere with the procedure and guarantees of the European Convention on Human Rights;

In paragraph 11, these are further described as “commitments and understandings” - certainly not as “recommendations”.

In my view, the main reason the Communist and nationalist majority in the State Duma voted in favour of accession to the CoE and ratification of the ECHR, was the fact that following the collapse of the USSR some 25 million ethnic Russians and Russian speakers were living outside the borders of the Russian Federation, and the CoE was seen as offering a comprehensive framework of opportunities for their protection.

Of the more than 200 treaties promulgated by the CoE, Russia has, as of 27 December 2017, signed and ratified 63 treaties, has signed but not ratified 16, and has not signed 130. One of the treaties signed but not ratified is the *European Charter for Regional or Minority Languages*, the “Languages Charter”, which it signed on 10 May 2001. I was an expert for the Council of Europe and European Union Joint Programme designed to assist ratification by Russia. The project failed – this was not my fault.

The CoE publishes a regularly updated overview of its Action in Russia.¹⁵ The highlights, which demonstrate the continuing intense relationship between Russia and the CoE, are:

Prevention of torture

The European Committee for the prevention of torture (CPT) visits places of detention (for juvenile or immigration detainees, police stations, psychiatric hospitals) in order to assess

10.17. to revise the law on federal security services in order to bring it into line with Council of Europe principles and standards within one year from the time of accession: in particular, the right of the Federal Security Service (FSB) to possess and run pre-trial detention centres should be withdrawn;

10.18. to adopt a law on alternative military service, as foreseen in Article 59 of the constitution;

10.19. to reduce, if not eliminate, incidents of ill-treatment and deaths in the armed forces outside military conflicts;

10.20. to pursue legal reform with a view to bringing all legislation in line with Council of Europe principles and standards: in particular, Presidential Decree No. 1226 should be revised without delay;

10.21. to extend its international co-operation to prevent - and eliminate the ecological effects of - natural and technological disasters;

10.22. to sign and ratify within a year from the time of accession the General Agreement on Privileges and Immunities of the Council of Europe and its additional protocols;

10.23. to co-operate fully in the implementation of Assembly Order No. 508 (1995) on the honouring of obligations and commitments by member states of the Council of Europe, as well as in monitoring processes established by virtue of the Committee of Ministers' Declaration of 10 November 1994 (95th session);

10.24. to respect strictly the provisions of international humanitarian law, including in cases of armed conflict on its territory;

10.25. to co-operate in good faith with international humanitarian organisations and to enable them to carry on their activities on its territory in conformity with their mandates.

¹⁵ <https://www.coe.int/et/web/portal/russian-federation> (accessed on 27 December 2017)

how persons deprived of their liberty are treated.¹⁶ It gives no notice in advance, and CPT delegations, which include experienced prison manager, doctors and psychiatrists, have the right to visit any place of detention, to be admitted, and to see anything they want to see and speak to any person they wish. The Russian member of the CPT, to 2019, is Olga Noyanova, Head of the International Relations Section, Office of the Human Rights Ombudsman of the Russian Federation.

Since ratification in 1998 the CPT has carried out 27 visits to Russia, 7 periodical and 20 ad hoc visits. 23 reports have been adopted, of which just 3 have been published (Russia has not accepted the automatic publication procedure). The CPT has made three Public Statements¹⁷ on Russia, in 2001, 2003 and most recently 2007. This is the CPT's "nuclear weapon". The CPT continues its regular visits. From 30 November to 13 December 2016 a CPT delegation carried out a periodic visit to Russia, to review the measures taken in response to recommendations made by the Committee after its previous visits. Particular attention was paid to the treatment and conditions of detention of persons in police custody and penitentiary establishments, including remand prisoners, juveniles and prisoners serving life sentences. Further, the delegation examined the situation of patients held in civil and forensic psychiatric hospitals and of residents of social care homes. The delegation chose to visit the following places of detention¹⁸

In addition, from 28 November to 4 December 2017 a CPT delegation carried out an ad hoc visit to the Chechen republic, its 12th, to review the treatment of persons deprived of their liberty by the police. Another objective of the visit was to examine the effectiveness of

¹⁶ Although Russia has since 2013 - <http://rm.coe.int/doc/0900001680697bd6> - not agreed to the publication of CPT reports, the CPT visits Russia regularly - <https://www.coe.int/en/web/cpt/russian-federation>.

¹⁷ Under Article 10 (2) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, if a State Party "fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the Party has had an opportunity to make known its views, by a majority of two-thirds of its members to make a public statement on the matter."

¹⁸ : Police establishments: Temporary detention facility (IVS) of the Internal Affairs Directorate of the South-Western Administrative District, Moscow; IVS at the Main Directorate of Internal Affairs of Krasnoyarsk region; IVS No. 5, Krasnoyarsk; IVS at the Main Directorate of Internal Affairs of Novosibirsk region; Penitentiary establishments: Pre-trial establishment (SIZO) No. 1 ("Matrosskaya Tishina"), Moscow; SIZO No. 2 ("Butyrka"), Moscow; SIZO No. 5, Moscow (unit for juveniles); SIZO No. 1, Krasnoyarsk (unit for juveniles); SIZO No. 1, Perm; Strict-Regime Colony No. 1, Solikamsk, Perm region; Colony No. 2 (for life-sentenced prisoners), Solikamsk. In addition, the delegation went to SIZO No. 1 in Novosibirsk in order to interview persons who had recently been in police custody. Psychiatric hospitals: Krasnoyarsk regional psycho-neurological dispensary No. 1; Federal specialised psychiatric hospital with intensive supervision, Novosibirsk; Psychiatric hospital No. 3, Novosibirsk; Social care homes: Shilinka psycho-neurological boarding home, Krasnoyarsk region; Ob psycho-neurological boarding home, Novosibirsk region. <https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-visits-the-russian-federation> (accessed on 28 December 2017)

investigations into allegations of ill-treatment of detained persons by law enforcement officials. The delegation visited a number of police establishments, a SIZO and the Republican Forensic Medical Bureau in Grozny.¹⁹

That is, the CPT organises an intrusive and wide-ranging programme of visits, putting the Russian penitentiary system under considerable pressure to comply and respond, which, by and large, it does.

Fight against racism

The European Commission against Racism and Intolerance (ECRI) is an independent monitoring body which provides member States with concrete and practical advice on how to tackle problems of racism and intolerance in their country. Conclusions on the Russian Federation have been adopted on 28 November 1977, 16 March 2001, 16 December 2005, 20 June 2013, and 17 March 2016.²⁰ The last of these focused on issues in respect of which Russia had not implemented ECRI's recommendations. ECRI was especially concerned at the prohibition on grounds of "extremism" of the sacred texts of non-traditional religious groups such as those of Jehovah's Witnesses and certain Muslim groups. ECRI noted that the list of banned materials now exceeded 3000 texts.

Protection of social rights

The European Social Charter guarantees social and economic human rights. It was adopted in 1961 and revised in 1996. The European Committee of Social Rights rules on the conformity of the situation in States with the European Social Charter, the 1988 Additional Protocol and the Revised European Social Charter. The Russian Federation signed the Revised European Social Charter on 14 September 2000 and ratified it on 16 October 2009, accepting 67 of the Revised Charter's 98 paragraphs.²¹ It has not yet accepted the Additional Protocol providing for a system of Collective Complaints – only 15 of the COE's 47 member states have done so. Since 2011 Russia has submitted 6 reports on the application of the Revised Charter. The 6th report, which was submitted on 16/01/2017, concerned the accepted provisions relating to

¹⁹ Temporary Detention Facility (IVS) of Argun City Internal Affairs Division; IVS of Police Division No. 1 in Grozny (Leninskiy district); Police Division No. 2 in Grozny (Zavodskoy district); Shali District Internal Affairs Division and its IVS; Mesker-Yurt Police Station, Shali District; Headquarters and barracks of Special-Purpose Patrol-Sentry Police Regiment named after A. Kadyrov, Grozny. The delegation also went to SIZO No. 1 in Grozny in order to interview persons who had recently been in police custody.
<https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-visits-the-chechen-republic-of-the-russian-federation> (accessed on 29 December 2017)

²⁰ https://www.coe.int/t/dghl/monitoring/ecri/country-by-country/russia/russianfederation_cbc_EN.asp? (accessed on 27 December 2017)

²¹ <https://rm.coe.int/16805ac116> (accessed on 27 December 2017)

Thematic Group 2 “Health, Social security and social protection”, namely: Articles 3, 11, 12, 13, 14, 23, 30 of the Revised Charter. The Conclusions of the European Committee for Social Rights are to be published in January 2018.

Protection of minorities

The Framework Convention for the Protection of National Minorities (FCNM) provides for a monitoring system to evaluate how the treaty is implemented by State Parties. The Advisory Committee (AC) adopts recommendations to improve minority protection. In December 2016 Russia submitted its Fourth Periodical Report to the AC. A delegation of the AC visited Tyumen, Kazan, Krasnodar and Moscow (group 1) and Murmansk and Moscow (group 2) from 16-24 October 2017 to evaluate progress.²²

Fight against corruption

The Group of States against Corruption (GRECO) monitors member states' compliance with the Council of Europe anti-corruption standards with the objective to improve the capacity of its members to fight corruption. The Fourth Evaluation Round took place in 2016, but the report on Russia remains confidential. Materials of the Third Compliance Round for Russia, in 2011, have been published.²³ One of the five members elected to the GRECO Bureau for the 5th Evaluation Round starting in 2017 is Mr Aslan Yusufov nominated by Russia²⁴, with colleagues from Croatia, France, Czech Republic, Switzerland, Slovenia and the UK.²⁵

Democracy through Law

The European Commission for Democracy through Law - the Venice Commission - “plays a leading role in the adoption of constitutions that conform to the standards of Europe's constitutional heritage”. The Venice Commission has adopted some 41 Opinions on proposed Russian legislation, the most recent of which was published on 18 December 2017.²⁶ The Russian members of the Commission are Ms Taliya Khabrieva, Director, Institute for

²² <https://www.coe.int/en/web/minorities/-/russian-federation-fourth-cycle-delegation-visit> (accessed on 27 December 2017)

²³ <https://www.coe.int/en/web/greco/evaluations/round-3> (accessed on 27 December 2017)

²⁴ Deputy Head of Department for Supervision over Compliance of the Anti-Corruption Legislation of the Prosecutor General's Office of the Russian Federation
https://eng.genproc.gov.ru/smi/news/news-1146570/?print=1&ELEMENT_ID=1146570 (accessed on 27 December 2017)

²⁵ <https://www.coe.int/en/web/greco/home> (accessed on 27 December 2017)

²⁶ <http://www.venice.coe.int/webforms/documents/?country=26&year=all> (accessed on 27 December 2017)

Legislation and Comparative Law, and the former Russian Judge at the ECtHR, Anatoliy Kovler.²⁷

There are several Russians in senior positions in the Secretariat of the CoE. Among them is Mikhail Borisovich Lobov, with whom I have been acquainted since 1996, who is now the Head of the Human Rights Policy and Co-operation Department in Directorate General I, Human Rights and Rule of Law. Another is Olga Sergeyevna Chernyshova, Head of Section in the Secretariat of the ECtHR. The continuing investment by the Russian government in reporting and representation at Strasbourg, involving a wide spectrum of government ministries and agencies cannot be underestimated. Nor can the focus this gives for civil society in Russia, which despite all obstacles put in its way continues a tireless monitoring of the activities of the authorities.

In an important article published in 2003²⁸, the Canadian historian Pamela Jordan reviewed the experience of Russian membership for the previous seven years, including its willingness to pay compensation in respect of decisions of the ECtHR with which it profoundly disagreed, and to bring about certain required reforms, and concluded that “countries such as the Russian Federation appear to be motivated more to guard their existing interests in areas their governments have defined as national security concerns than to meet obligations and take part in social learning. Compliance tends to occur largely for instrumentalist reasons, and arguably the Council of Europe has been forced to adjust its expectations to justify keeping these members onboard.”²⁹

And in 2009 the political scientist and lawyer Alexei Trochev sought to assess the impact of ECtHR decisions on Russia.³⁰ He argued that the Russian judiciary may be the most Strasbourg-friendly branch of the Russian government.³¹ His conclusion, based on detailed empirical research, was very much in line with my own impressions, but perhaps surprising for those who receive an unremittingly gloomy picture of Russia.

... the impact of the Strasbourg court’s judgments on Russia is hard to exaggerate. Symbolically, it remains the most powerful court in the eyes of many Russians: week

²⁷ <http://www.venice.coe.int/WebForms/members/default.aspx?lang=EN> (accessed on 27 December 2017)

²⁸ Pamela A. Jordan “Does Membership Have Its Privileges?: Entrance into the Council of Europe and Compliance with Human Rights Norms” *Human Rights Quarterly* Volume 25, Number 3, August 2003 pp. 660-688, at

²⁹ Jordan (2003) *ibid*, p.688

³⁰ Alexei Trochev “All Appeals Lead to Strasbourg? Unpacking the Impact of the European Court of Human Rights on Russia” *Demokratizatsiya*, Vol. 17, No. 2, pp. 145-178, Spring 2009; Univ. of Wisconsin Legal Studies Research Paper No. 1082

³¹ Trochev (2009) *ibid*, p.146

after week, the mass media informs them that the ECtHR routinely rules against the Russian government and that the government promptly pays out compensation awarded by this tribunal to all successful applicants. This remains true, although very few government officials are actually punished for committing the human rights violations, as identified by the Strasbourg tribunal. Moreover, the mere threat of litigation from the ECtHR forces government officials to take care of complainants, even if they do so half-heartedly, on a case-by-case basis, and only when following orders from the top. Responding to losses in Strasbourg, Russia witnessed a flurry of legislative activity, as well as increased funding for the prison system and the judicial branch.

I have shown in perhaps too much detail, but with references to a great deal more, that Russia is fully engaged in the structures and mechanisms of the CoE. That is, Russia is immersed in international law of a kind which does not permit mere window-dressing, but requires constant action and reaction. Russia's law and practice change significantly as a result, and in turn Russia participates in the development of international law.

Russia's view of the Council of Europe; and the impact on Russian law and practice of the work of the European Court of Human Rights

The CoE rarely figures in President Putin's discourse except as an irritant, particularly with regard to Crimea and Donbas. And 2018 will see a number of controversial ECtHR judgments against Russia, particularly with regard to the 2008 war with Georgia – another CoE member.

On 3 March 2016 Sergei Lavrov, Russia's Foreign Minister published an article entitled "Russia's Foreign Policy: Historical Background" in the journal "Russia in Global Affairs".³² He started with an observation with which I entirely agree:

History doesn't confirm the widespread belief that Russia has always camped in Europe's backyard and has been Europe's political outsider. I'd like to remind you that the adoption of Christianity in Russia in 988 – we marked 1025 years of that event quite recently – boosted the development of state institutions, social relations and culture and eventually made Kievan Rus a full member of the European community. At that time, dynastic marriages were the best gauge of a country's role in the system of international relations. In the 11th century, three daughters of Grand Prince Yaroslav the Wise became the queens of Norway and Denmark, Hungary and France. Yaroslav's sister married the Polish king and granddaughter the German emperor.

However, his account of subsequent history stresses the greatness of the Russian Empire and the disaster of the 1917 Revolution. For him the acme of Russian power was the reign of

³² http://www.mid.ru/en/web/guest/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2124391 (accessed on 27 December 2017)

Catherine II, “... when, as then Chancellor Alexander Bezborodko put it, ‘Not a single cannon in Europe could be fired without our consent.’”. Following 1991, “Logically, we should have created a new foundation for European security by strengthening the military and political components of the Organisation for Security and Cooperation in Europe (OSCE)... Unfortunately, our Western partners chose differently. They opted to expand NATO eastward and to advance the geopolitical space they controlled closer to the Russian border. This is the essence of the systemic problems that have soured Russia’s relations with the United States and the European Union.” He did not mention the Council of Europe at all. Nor has he done so, except in passing, for several years.

In the context of the on-going tension between Russia and the CoE, it is therefore instructive to consider the interview given by Russia’s Permanent Representative (Ambassador) to the Council of Europe, Ivan Soltanovsky, to the official daily *Rossiyskaya Gazeta*, published on September 14, 2017.³³ He started by emphasising that “For over 20 years Russia, together with the UK, Germany, Italy, France and in recent years also Turkey, has been a member of the group of “principal contributors” to the budget of the Council of Europe which have shouldered the bulk of responsibility for the organisation’s future... [we have] suspended the payment of the 2017 dues to the Council of Europe until the rights of the Russian Federal Assembly at PACE, which are stipulated by the Council of Europe’s Charter, are fully restored.” He insisted that

... an information war with respect to Russia is underway in the West and our policy in the Council of Europe often becomes the subject of questionable political speculation... the West European members of the Council of Europe expected that after Russia’s accession to the Council of Europe it would as if by magic fit into the Procrustean bed of Western political morality. As is only natural, this did not happen. Regrettably, the EU Expanding Europe concept has gained supporters in the West, which is about the European Union’s domination and central role on the European continent. Against its will, the Strasbourg organisation has found itself on the sidelines.

He did not expand on his understanding of the “Procrustean bed”, nor did he offer an opinion as to the nature of “Western Political morality”. I suspect that he had in mind the constant Russian assertion that the West is guilty of hypocrisy and “double standards” – a phrase which find its way into almost every official Russian statement concerning relations with the West. However, he insisted on Russia’s continued commitment to the CoE, and I hope I will be forgiven for citing this passage from his long interview:

³³ http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2864004

I do not see any real alternative to the Council of Europe in Europe. Against the background of an emerging chronic crisis of other European institutions, the current political situation in Europe is giving the Council of Europe a chance to become a true centre of attraction for the entire continent. But for this, it should give up politicking, display the political will and, giving the Council of Europe a real “shake,” set a course for cleansing the Strasbourg organisation of the backlog of double standards in all soft security areas...

We have achieved the main goal of our joining the Council of Europe: we have benefited from the positive experience of other countries’ development in many areas and also presented our vision of European development as well as our experience of ethnic relations to the community of nations that are represented in the Council of Europe. Over a period of the 20 years of our work at the council, Russia has joined over 60 legally binding conventions plus protocols of this organisation. We have amended our laws on corruption, for example, we have criminalised trading in influence and corrupt payment, as well as created mechanisms for interaction among the Council of Europe’s counterterrorism agencies. There is no alternative to cooperation between Russia and Western countries, because we are geographic neighbours with a centuries long shared history, even if some people refuse to remember this.

Here is another example of official Russian discourse concerning the CoE, also mixing regretful dissatisfaction with warm endorsement. The official web-site of the Embassy of the Russian Federation in London presents a fascinating overview of “Russia and the Council of Europe”.³⁴ It starts:

The Council of Europe has risen from the ashes of the World War II. Its activities in the humanitarian domain are aimed at ensuring security of every European in its broader meaning. The better the guarantees of the social conditions of the human life are, the better the rights record is, the stronger the economy is, the more protected the individual is in society, the less reasons he or she has to resolve problems using force. In the conditions of the current crisis this is felt especially strongly... the very concept of security has undergone qualitative transformation. The question is no longer about hostile States, against which old-style coalitions have to be created... it is the unresolved problem of hard security, the relict agenda of the Cold War era, that hampers the effective development of such cooperation.

This is followed by fulsome praise for the CoE, followed by Russia’s perception that the true objective of the suspension of the voting rights of Russia’s delegation to PACE is – the subordination of the CoE to the European Union and to NATO:

The Council has proven its effectiveness not only in such critical areas as human rights, the rule of law, and the strengthening of democracy. It also contributes substantively to dealing with problems associated with new threats and challenges: terrorism, money laundering and corruption – these are all major issues to which the Council devotes heightened attention.

³⁴ <https://rusemb.org.uk/rce/> (accessed on 28 December 2017)

The proposals to diminish the mandate and competence of our Organization are inadmissible, as well as the attempts to limit its independence, transform the Council of Europe into a subsidiary body of the other European structures. The Strasbourg Organization must be the leading European lawmaker in the proper sense of the word.

For this reason, Russia is especially keen on the accession of the EU to the ECHR and its representation on the ECtHR, as specified in Protocol 14 to the ECHR, and the Lisbon Treaty of the EU.

We also favor the European Union's speedy accession to the European Convention on Human Rights, based on the recognition by the EU of the jurisdiction of the European Court of Human Rights on terms that are subject to ratification by all 47 member of the Council of Europe. We proceed from the fundamental importance of the fact that such an agreement would fully ensure the preservation of the supremacy of the European Convention on Human Rights for all of the Council of Europe area, and the central role of the European Court of Human Rights in relation to any breach of the Convention, no matter by whom: EU members or non members, the EU itself or its bodies and institutions.

Thus, a persistent and consistent message from Russia is that the CoE and ECtHR, of which Russia is a member, present the possibility of countering the inexorable expansion of the EU, of which it will never be a member.

Russia now has a new representative at the European Court of Human Rights, Mikhail Lvovich Galperin, relatively young to have been appointed, on 19 May 2017, to this position, and to the rank of Deputy Minister of Justice, closely following signing into law by President Putin, on 5 May 2017, of Russia's ratification of Protocol 15 to the ECHR.³⁵ Mr Galperin replaced Georgiy Matyushkin, who served for 9 years. Mr Galperin was born in 1983, and graduated in law from St Petersburg State University, with an LLM in Law from University of London (UCL and QMW) in 2010. His doctoral thesis was entitled "Responsibility in contemporary civil procedure". He has acted as a Judicial Assistant in the USA, and worked for several years in the audit department of Ernst and Young.³⁶ He, like the Russian judge at Strasbourg, Dmitriy Dedov, is primarily a commercial lawyer.

In September 2017 Mr Galperin's boss, Alexandr Konovalov, the Minister of Justice of the Russian Federation, visited Strasbourg and met Guido Raimondi, President of the ECtHR, and Thorbjørn Jagland, Secretary General of the CoE. The press report of his visit referred to information he had given in February 2017: the ECtHR had become much more focused on

³⁵ <https://legal.report/article/02052017/putin-podpisal-zakon-o-novoj-rol-i-espch> (accessed on 28 December 2017)

³⁶ <https://www.hse.ru/staff/galper/>; and <https://www.kommersant.ru/doc/3303129> (both accessed on 28 December 2017)

paying attention to the problems of law enforcement in the Russian Federation. In 2016, the ECtHR received 5,500 complaints from Russia - 7% fewer than in 2015. However, the number of complaints communicated to Russia increased by 400 (up to 1,700), and the number of rulings in respect of Russia increased to 238 (in 2015 - 116). As to the number of complaints submitted to the ECtHR per capita from the 47 countries of the CE, Russia is in the 30th position. The annual number of complaints from Russia to the ECHR has reduced by more than half in five years (from 10-12,000 a year in 2011-2012), and the number of complaints pending against Russia in the ECtHR has dropped more than fourfold in four years - from 40,300 to 7,800 complaints.³⁷ Earlier, the Ministry of Justice sent to the Committee of Ministers of the CE reports on payments to applicants in the ECHR compensation for more than 424 million rubles.

Without doubt, the intended message is that Russia is no longer, if it ever was, an outlier in the CoE and ECHR system, but increasingly a normal European country.

It was in this vein that on 20 December 2017 Mr Galperin gave an exclusive interview to the legal web portal *legal.report*.³⁸ He started by insisting that

Russia's participation in the ECtHR and the ECHR is a positive experience. Many important changes in our laws were the result of implementation of judgments of the ECtHR. For example, the well known case *Burdov v Russia* [the first "pilot judgment" against Russia] as to the execution of judicial decisions against the government. Also the protection of people in detention, and the improvement of their conditions of detention, and many other questions.

I repeat: our legal system for the last 20 years has developed largely under the influence of the ECtHR decisions. Without too much pathos I can say that participation in the ECtHR mechanism allows Russia not only to remain in the European legal field, but also to participate with some success in its formation and development.

This information has been substantiated by the CoE itself.³⁹ In 2016 PACE, assisted by the Human Rights Centre at the University of Essex, published a report on the impact of the ECHR in various countries⁴⁰. The Report identified a number of instances of positive impact.

³⁷ <http://tass.ru/obschestvo/4590814> (accessed on 28 December 2017)

³⁸ <https://legal.report/article/20122017/syurprizy-espch-karmannye-arbitrazhi-i-novye-perspektivy-dlya-yuristov> (accessed on 28 December 2017)

³⁹ See Bill Bowring "Does Russia have a human rights future in the Council of Europe and OSCE?" in Doutje Lettinga & Lars van Troost (eds) *Shifting Power and Human Rights Diplomacy: Russia* (2017) *Amnesty International Netherlands*, pp. 53-63. at https://www.academia.edu/31979697/Shifting_Power_and_Human_Rights_Diplomacy_Russia?auto_accept_coauthor=true

⁴⁰ PACE (Parliamentary Assembly of the Council of Europe) (2016) 'Impact of the European Convention on Human Rights in States Parties: selected examples', *Council of Europe*, 8 January. Available at:

- As a result of the pilot judgement in *Burdov v Russia* in 2009 over non-enforcement of a domestic court judgement in favour of the applicant, Russia enacted a Federal Compensation Act, as well as a Federal Law to guarantee the effectiveness of the new remedy.
- In 2005 the Supreme Court of the Russian Federation followed up the CoM's 2004 Declaration and extended journalists' freedom of expression to criticism of public officials: public officials must accept that they will be subject to public scrutiny and criticism. In 2008 the Court closed a number of applications in view of this change.
- Following *Mikheyev v. Russia* (2006) and other, similar, judgements, on account of torture or inhuman and degrading treatment inflicted on persons held in police custody, and a lack of effective investigations into such acts, special investigation units were created within the Investigative Committee, tasked with investigating particularly complex crimes by police and other law enforcement bodies.
- There had been progress in the implementation of the Court's 2012 pilot judgement in *Ananyev and Others v. Russia* concerning inhuman and degrading conditions in Russian remand centres and the lack of an effective remedy. Russia presented and has been implementing an action plan as a result, monitored by the CoM.
- A number of measures have been taken to remedy numerous violations of the right to liberty, guaranteed by Article 5 of the Convention, owing to unlawful and lengthy unreasoned (or poorly reasoned) detention on remand. Legislative changes were made between 2008 and 2011. Both the Constitutional Court and the Supreme Court have emphasized that a suspect or accused may be detained only on the basis of a valid judicial decision. This was most recently monitored by the CoM in 2015.

Did the Council of Europe have its origins in “Western morality”?

In this section I present and discuss the recent work of two leading scholars of the CoE and human rights, Andrew Moravcsik, a political scientist,⁴¹ and Samuel Moyn, an historian⁴². It

<http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5968&lang=2&cat=5> (accessed on 28 December 2017)

⁴¹ Andrew Maitland Moravcsik (born 1957) is a Professor of Politics and director of the European Union Program at Princeton University. He is known for his research on European integration, international organizations, human rights,

⁴² Samuel Moyn (born 1972) is a professor of law and history at Yale University, which he joined in July 2017. Previously, he was a professor of history at Columbia University for thirteen years and a professor of history and of law at Harvard University for three years. His research interests are in modern European intellectual history, with special interests in France and Germany, political and legal thought, historical and critical theory,

is curious that neither refers to the other – but their standpoints and analyses are markedly different if in the end convergent.

Starting in 1995, before Russia joined the CoE, Moravcsik asked the question “Under what conditions are effective international regimes for the promotion of human rights likely to emerge?”.⁴³ He identified a mechanism of “shaming”.⁴⁴ He noted the high level of compliance with judgments of the ECtHR⁴⁵, and that only in the 1980s did the system begin to develop extensive constitutional case-law. He put this delay down to the fact that ratification of the instrument and adherence to various of its specific provisions was voluntary.

Moravcsik returned to these questions in 1998.⁴⁶ Now the question was posed as follows: Why would governments establish an arrangement that invades domestic sovereignty in this way? He distinguished between two main explanatory methods: the *realist* view which asserts that the most powerful democracies seek to externalize their values, coercing or enticing weaker and less democratic governments to accept human rights regimes, and the *ideational* view which argues that the most established democracies externalize their values, setting in motion a transnational process of diffusion and persuasion that socializes less democratic governments to accept such regimes. The ideational view was linked to liberalism and constructivism, and was characterised by a commitment to the transformative power of normative discourse and ideals.

As against these, he proposed an *institutional liberal* view, and maintained that governments delegate for a self-interested reason, namely to combat future domestic political uncertainty. Therefore it was “not the most powerful or persuasive democracies, but weakly established democracies that favor enforceable (as opposed to merely rhetorical) human rights obligations, because such commitments help lock in democratic governance against non-democratic domestic opposition.”⁴⁷ These theories were to be tested in respect of the ECHR. Looking closely at the diplomatic and other records, he concluded that “the strongest postwar advocates of binding human rights guarantees were recently re-established democracies,

⁴³ Andrew Moravcsik. 1995. “Explaining International Human Rights Regimes: Liberal Theory and Western Europe,” *European Journal of International Relations* 1:2 (Summer), 157-189, p.157

⁴⁴ Moravcsik (1995) *ibid* p.168

⁴⁵ Moravcsik (1995) *ibid* p.170-171

⁴⁶ Andrew Moravcsik 1998 “Explaining the Emergence of Human Rights Regimes: Liberal Democracy and Political Uncertainty in Postwar Europe” *Working Paper Series 98-17 Weatherhead Center for International Affairs*, Harvard University, at <https://wcfia.harvard.edu/publications/explaining-emergence-human-rights-regimes-liberal-democracy-and-political> (accessed on 28 December 2017)

⁴⁷ Moravcsik (1998) *ibid* p.1

while more established democracies like Britain, Sweden, the Netherlands and Denmark uniformly sided with transitional regimes like Greece and Turkey in opposition to binding guarantees.”

The timing of the negotiations in 1949 was, in his view, consistent with all three theories—realist, idealist, and liberal. “The first decade after World War II was one of emergent bipolar conflict, powerful democratic great powers, salient historical reminders of human rights violations, and the reestablishment of democratic governance.”⁴⁸ He noted that “Austria, Belgium, France, Germany, Iceland, Ireland, and Italy supported creation of a Court of Human Rights and mandatory jurisdiction, while Denmark, Greece, Luxembourg, the Netherlands, Norway, Sweden, Turkey and the United Kingdom were opposed to anything except a court whose jurisdiction remained optional.”⁴⁹ Following analysis he argued that “There is almost no support for the realist or ideational view that the most democratic (or the most powerful) countries support human rights guarantees.”⁵⁰ His conclusion was

The most striking finding of this study—given the dominant role of altruistic motivations in nearly every scholarly treatment of human rights—is the near-total absence of evidence in favor of altruistic motivations or transnational socialization, once the analysis is properly controlled for sophisticated forms of self-interest.⁵¹

Moravcsik followed this analysis in an article published in 2000⁵² (in which Russia was identified as a “transitional regime”)⁵³ and in which he repeated that the origins of the ECHR lay in “self-interested efforts by newly established (or reestablished) democracies to employ international commitments to consolidate democracy - “locking in” the domestic political status quo against their nondemocratic opponents...”⁵⁴

Moravcsik’s articles on this topic have been widely cited, but perhaps best summed up by Mikael Rask Madsen in 2011:

The original Convention had mainly sought to ensure liberal democracy in Europe. As argued by Andrew Moravcsik, the goal of the 1950 [ECHR] was predominantly to

⁴⁸ Moravcsik (1998) *ibid* p.13

⁴⁹ Moravcsik (1998) *ibid* p.13

⁵⁰ Moravcsik (1998) *ibid* p.15

⁵¹ Moravcsik (1998) *ibid* p.23

⁵² Andrew Moravcsik “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe” *International Organization* Volume 54, Issue 2 (2000), pp. 217-252

⁵³ Moravcsik (2000) *ibid* p.229, n.42

⁵⁴ Moravcsik (2000) *ibid* pp.243-4

‘lock in democratic governance against future opponents’ and was by no means ‘a conversion to moral altruism’ of the Member States.⁵⁵

This was a “Cold war-inspired objective” - “the goal was hardly to alter substantially the protection of human rights in the Member States but collectively to guarantee against a return to totalitarianism in Western Europe.”

Or as the late Ian Brownlie and Guy S. Goodwin-Gill put it in their introduction to the ECHR in their collection of human rights documents, referring to “... the Council of Europe, an organisation created in 1949 as a sort of social and ideological counterpart to the military aspects of European cooperation represented in [NATO]. The Council of Europe was inspired partly by interest in the promotion of European unity and partly by the political desire for solidarity in the face of the ideology of Communism.”⁵⁶

Samuel Moyn caused a sensation in 2010 with his revisionist account of the history of human rights, as the “Last Utopia”.⁵⁷ Perhaps his most provocative assertion was that “the drama of human rights is that they emerged in the 1970s, seemingly from nowhere”.⁵⁸ He was able to give a more precise date: “The year of human rights, 1977, began with Carter’s January 20 inauguration, which put “human rights” in front of the viewing public for the first time in American history.”⁵⁹ Furthermore, Moyn insisted that the 1789 *Déclaration de Droits de l’Homme et du Citoyen* was actually a political document about citizenship, and had nothing to do with the real human rights which emerged in the 1977. Turning to the CoE and the ECHR, Moyn referred to the “preeminent role Christianity could play in the postwar framing of human rights”⁶⁰, and to the “...sheer authenticity and passion with which Christian and conservative championship of “human rights” took place...”⁶¹ He added that for many proponents of European human rights “... human rights, far from originating in 1789, were a Christian bequest to be defended against the legacy of the French Revolution – or even revolution as such – that still threatened.”⁶² He identified “political and civil rights, prioritized as the essence of Western European identity” and insisted that “... it would be a gross error to

⁵⁵ Mikael Rask Madsen “The Protracted Institutionalisation of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence” in Jonas Christoffersen, Mikael Rask Madsen (eds) *The European Court of Human Rights Between Law and Politics* (Oxford, 2011), pp.43-60, pp.43-4

⁵⁶ The late Ian Brownlie and Guy S. Goodwin-Gill *Brownlie’s Documents on Human Rights* 6th ed, Oxford, Oxford University Press, 2010, p.679-80

⁵⁷ Samuel Moyn *The Last Utopia: Human Rights in History* Cambridge, Mass: Belknap: Harvard University Press, 2010

⁵⁸ Moyn (2010) *ibid* p.2

⁵⁹ Moyn (2010) *ibid* p.155

⁶⁰ Moyn (2010) *ibid* p.74

⁶¹ Moyn (2010) *ibid* p.75

⁶² Moyn (2010) *ibid* p.76

assume that the language of human rights, let alone the law of human rights mattered much in the beginning, The European Convention involved much more ideological signalling about the values on which Western European identity depended than it did legally enforceable guarantees.”⁶³

Moyn and Moravcsik, it seems to me, from their North American perspective, fail to note the striking fact that the ECHR follows the language of the 1789 *Déclaration* almost word for word, or the horror with which Edmund Burke, Jeremy Bentham and A. V. Dicey in England identified the intellectual terrorism of the Rights of Man – a horror which persists to the present day in English reluctance to countenance the ECHR.⁶⁴ Dicey, writing at the end of the 19th century reserved his sharpest criticism for the persistence of the 1789 *Déclaration* in the contemporary French and Belgian constitutions.

For sure, as Moyn asserts,

From the beginning the energy in the movement to defend and define human rights as the essence of European civilisation in the European Convention came from conservatives – Churchill and his allies out of power, anxious about the spectre of socialism at home, and opposite numbers on the Continent worried about the impending triumph of materialism over spiritual values.⁶⁵

This is to confirm the ideological, Cold War, content of the CoE and ECHR at their origin. But I contend that the revolutionary and scandalous – for common lawyers – content of the ECHR, with its roots in the 1789 *Déclaration*, has re-emerged in the cases against the UK concerning Northern Ireland and Iraq, the Kurdish cases against Turkey, and the Chechen cases against Russia.⁶⁶

Moyn has pursued his investigation of the Christian origins of human rights in the Mellon lectures he gave at the University of Pennsylvania, published in 2015 as *Christian Human Rights*.⁶⁷ His message is, as explained in his blog, that “my general thesis has been that through this lost and misremembered transwar era, it is best to see human rights as a project of the Christian right for the most part, not the secular left.”⁶⁸

⁶³ Moyn (2010) *ibid* p.79

⁶⁴ See Bill Bowring “England’s terror of the French Revolution: the historical roots of resistance to the Rights of Man and the case against the Human Rights Act” in Frederick Cowell (ed) *Critically Examining the Case Against the 1998 Human Rights Act* (Abingdon, Routledge, 2017), pp. 52-68

⁶⁵ Moyn (2010) *ibid* pp. 78-9

⁶⁶ I represented many Kurdish applicants against Turkey in the 1990s, and many Chechen applicants against Russia from 2000 onwards.

⁶⁷ Samuel Moyn *Christian Human Rights* University of Pennsylvania Press, 2015

⁶⁸ <https://tif.ssrc.org/2015/05/29/christian-human-rights-an-introduction/> (accessed on 29 December 2017)

In a long Critical review article first published in *The Hedgehog Review* in 2016, Ronald Osborn referred to Moyn's thesis as "Conservatism by other means", and shows a number of Moyn's claims to be selective or even false.⁶⁹ In 2017 *The Kings Law Journal* published a symposium on *Christian Human Rights*. In his Introduction⁷⁰, Moyn made the claim that "The truth is that Europe and therefore the modern world drew nearly everything from Christianity in the long term."⁷¹ This is, of course, as true of Russia, which took Orthodoxy from Byzantium, as it is of any European country. The problem is that throughout his recent interventions, when Moyn says "Christianity", he means Catholicism. His focus is Pope Pius XII, who was, very controversially, Pope from 1939 to 1958.

In his reply, Moyn states as follows:

Something extraordinary has happened to the Christian faith of Western Europeans, for good or ill. Whether my commentators are coy, critical or celebratory about these developments, all agree that human rights have largely outlived their Christian phase - even if without the influence of Christianity at a specific juncture in its recent history, people might have had to find something else to believe in.⁷²

My own conclusion is also that there is no monolithic Western European morality or ideology against which some Russian discourse is to be counterposed. And most certainly not some Western European "Christianity".

Transplants?⁷³

The theory of legal transplantation is a crucial domain within the theory of legal comparativism. The debate concerning 'legal transplants' can be said to have begun in earnest in an exchange between Alan Watson and Otto Kahn-Freund in the 1970s.⁷⁴ There is now an extensive and growing scholarly literature on legal transplants, especially as concerns the former Soviet Union and Eastern Europe. Most of it – with a few exceptions – concerns commercial law. Thus, Frédérique Dahan wrote:

⁶⁹ *The Hedgehog Review*, Spring 2016, Vol.18, No.1; <https://ronaldosborn.com/conservatism-by-other-means-samuel-moyns-christian-human-rights/> (accessed on 29 December 2017)

⁷⁰ Samuel Moyn, Introduction, *King's Law Journal*, 2017, Vol. 28, No. 1, pp. 1–5. John Finnis, Lorenzo Zucca and Thomas Pink provide trenchant critiques.

⁷¹ Moyn (2017) p.3

⁷² Samuel Moyn "Tradition and Beyond: *Christian Human Rights* in Debate" pp.27-34, at p.34

⁷³ An extended exploration of these issues is to be found in Chapter 11, pages 183 to 206, "The problem of 'legal transplantation' and human rights" in Bill Bowring *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Abingdon, Routledge, 2008)

⁷⁴ Otto Kahn-Freund (1974) 'On Uses and Misuses of Comparative Law' 37 *Modern Law Review* p. 1; Alan Watson, Alan (1976) 'Legal Transplants and Law Reform' 92 *Law Quarterly Review* pp. 79-84; Alan Watson (1993) *Legal Transplants: An Approach to Comparative Law* (Athens and London: University of Georgia Press, 2nd edn 1993 - 1st edn 1973)

What is indisputable is that for the legal systems of Central and Eastern Europe, transplantation is a reality. Because transition economies cannot afford and do not wish to go through the same process of slow and tentative development as the developed economies did in the past in order to achieve their modern legal and regulatory structures, they must, to a large extent, import them.⁷⁵

But importing a legal doctrine, mechanism or even a statute is not the same as importing an automobile; and even the automobile may need adapting for left-hand driving. Scott Newton, commenting on Dahan's remark, points out that:

. . . the very term 'transplantation', biased towards the technical, masks the political realities, for 'legal transplantation' is always necessarily a species of the genus legislation. That is, even supposing a jurisdiction decides to import a foreign law lock, stock and barrel, it nonetheless must enact it, with all the sovereign political implications any enactment brings . . . in transplantation as in transition, the emphasis on product over process works to privilege legality over legitimacy.⁷⁶

Most writers on transplantation, for the most part transplants in the commercial arena, do not share Newton's sensitivity to the issues.

No one can question the transformation of the Russian legal system since the mid-1980s - and especially since 1991, with accession to the CoE in 1996, and ratification of the ECHR in 1998. But it should be obvious that, especially in the spheres of constitutional and human rights, Russia has not been importing US models. Instead, it has, through its own choice, drawn closer once more to the Western European mainstream.

The question is: what was there before? Was there a 'legal culture' simply anathema to human rights? Was Russia simply the home of backwardness and despotism? Is it really the case that the Russians are condemned to catching up with the enlightened West from a position of legal barbarism? To answer these questions, the historical perspective is essential.

I suggest just two examples.

Serfdom, *krepostnoye pravo*, was abolished in Russia in 1861. Slavery was finally abolished in the USA in 1866 – the American Anti-Slavery Society was founded in 1833.

Jury trial was introduced in a number of Western European countries at about the same time as in Russia, 1864, though it had been strongly advocated by leading law reformers from the late eighteenth century. Jury trial was from 1993 available in nine of Russia's 85 regions, and since the enactment of the Criminal Procedural Code in 2000 has been extended to the rest of

⁷⁵ Frederique Dahan (2000) 'Law Reform in Central and Eastern Europe: The "Transplantation" of Secured Transactions Laws' 2:3 *European Journal of Law Reform*, pp. 369–384

⁷⁶ Scott Newton (2001) 'Transplantation and Transition: Legality and Legitimacy in the Kazakhstani Legislative Process' *SOAS Working Paper*, p. 3

the country, including Chechnya.⁷⁷ This is not an innovation forced on Russia after defeat in the Cold War. It is the restoration of an effective system of jury trial for all serious criminal cases, presided over by independent judges, which existed in Russia from 1864 to 1917.

Marina Nemytina, although pessimistic for the future of jury trial in today's Russia, insisted that in 1993 "The first trials by jury were heralded as the reestablishment of the institution in Russia. Trial by jury was represented as not something borrowed from the West in the course of the democratic changes, but as a native legal tradition that was being revived."⁷⁸

What is frequently neglected is any recognition of Russia's own prerevolutionary traditions, especially the reforms of Alexander II (1855–1881). Starting with the revolutionary Law on Emancipation of the Serfs in 1861, these reforms culminated in the Laws of 20 November 1864.⁷⁹ The new Laws introduced a truly adversarial criminal justice procedure, and made trial by jury obligatory in criminal proceedings. Judges were given the opportunity to establish real independence, in part by freeing them of the duty to gather evidence, and enabling them to act as a free umpire between the parties. The Prokuracy lost its powers of 'general review of legality', and became a state prosecutor on the Western model. The institution of Justices of the Peace was introduced. It is ironical that the Bolsheviks reinstated the pre-reform model of the Prokuracy.

Indeed, as Samuel Kucherov wrote in 1953: 'Between 1864 and 1906, Russia offered the example of a state unique in political history, where the judicial power was based on democratic principles, whereas the legislature and executive powers remained completely autocratic.'⁸⁰ A collection on jury trial in Russia contains an extensive memoir by one of the most distinguished judges of the period, A. F. Koni.⁸¹ Moreover, it also reproduces the advocates' speeches and judicial summings-up in some of the most famous trials, for example the trial in 1878 of Vera Zasulich, charged with the attempted murder of the governor of St Petersburg, Trepov, whom she had shot in broad daylight and before witnesses. Koni, who

⁷⁷ See Gennady Esakov "The Russian Criminal Jury: Recent Developments, Practice, and Current Problems" *The American Journal of Comparative Law*, Volume 60, Issue 3, 1 July 2012, Pages 665–702; Stephen C. Thaman, "Questions of Fact and Law in Russian Jury Trials: The Practice of the Cassational Courts Under the Jury Laws of 1864 and 1993", 72 *Revue internationale de droit penal* 415, 417-19 (2001)

⁷⁸ Marina Nemytina, "Trial by Jury: A Western or a Peculiarly Russian Model?" 72 *Revue internationale de droit penal* 365 at https://www.cairn-int.info/article-E_RIDP_721_0365--trial-by-jury-a-western-or-a.htm (accessed on 29 December 2017)

⁷⁹ Chistyakov O. I. and Novitskaya T. E. (eds) (1998) *Reformi Aleksandr II* (Reforms of Aleksandr II) (Moscow, Iuridicheskaya Literatura)

⁸⁰ Samuel Kucherov (1975) *Courts, Lawyers and Trials under the Last Three Tsars* (New York, Greenwood Press), p.215

⁸¹ Kazantsev, S. (1991) *Sud Prisyazhnikh v Rossii: Gromkiye Ugolovniye Protsessi* (Trial by Jury in Russia: Great Criminal Trials) (St Petersburg: Leniizdat)

was presiding judge, refused to be pressured by the authorities, and Zasulich was acquitted, a verdict which was respected by the authorities.

It is noteworthy that in the major speeches made to legal audiences at the start of his presidency, Putin referred to just these issues. His speech of 24 January 2000⁸² was delivered in his then capacity of Acting President to a colloquium of leaders of Republic, Krai, and Oblast Courts. His main theme was the independence of the judiciary. He quoted Judge Koni, and referred to the necessity for correspondence with generally recognised norms of international law. Most important, he made explicit reference to the ratification by Russia of the European Convention on Human Rights and Fundamental Freedoms, which had therefore become a constituent part of the Russian legal system. Above all, he said, the jurisdiction of the European Court of Human Rights had been recognised. Therefore special attention must be given to those problems of the Russian judicial system that were likely to call forth a reaction from the European Court.

In order to understand these processes, we should look deeper still into Russian history and traditions. Gross errors by US and other Western legal experts and commentators would be avoided by the realisation that judicial independence, adversarial court proceedings and trial by jury are not recent imports from the liberal West to the uncultured East, but the reinstatement of a rich and specifically Russian experience.

This history begins at a climactic time for the UK and for Western Europe, and with a surprise for Western scholars. A textbook on legal thought⁸³ points out that the first Russian professor of law, S. E. Desnitskiy (1740–1789), was a product not so much of the French Enlightenment, that is of Diderot and Rousseau, but of the Scottish Enlightenment.

Desnitskiy studied in Scotland, under Adam Smith and others, from 1761 to 1767, when he received a Doctorate of Civil and Church Law from the University of Glasgow. He was much influenced by the ideas of the Scottish Enlightenment, especially by the philosophy of David Hume, and especially by the Scottish emphasis on Roman Law traditions and principles – the focus of Alan Watson’s pathbreaking work on legal transplants.⁸⁴ On the basis of his lengthy researches in Scotland, in 1768 Desnitskiy sent the Empress Catherine II his ‘Remarks on the institutions of legislative, judicial and penitentiary powers in the Russian Empire’ – however,

⁸² <http://kremlin.ru/events/president/transcripts/21536> (accessed on 29 December 2017)

⁸³ Azarkin, N. M. (1999) *Istoriya yuridicheskoi mysli Rossii: kurs lektii* (History of legal thought in Russia: a course of lectures) (Moscow)

⁸⁴ Alan Watson (1993)

his suggestions were entirely unacceptable, and the work was sent to the archives. Among other radical proposals, Desnitskii urged the abolition of serfdom. He survived Catherine's rejection of these ideas, and became a full professor of law in 1777, shortly after the Pugachev uprising. He published books introducing Russians to the ideas of Adam Smith and John Millar. At Catherine's own instruction, he translated into Russian volume 1 of Blackstone's Commentaries, and this was published in Moscow in 1780–1783. His courses included the history of Russian law, Justinian's Pandects, and comparisons of Roman and Russian law.⁸⁵ He died in the year of the French Revolution, and the Declaration of the Rights of Man and of the Citizen.

It should be noted that Desnitskiy did not undertake a simple transmission of some already existing Western liberalism to Russia. The period of his work was as much the period of the revolt of reason against autocracy in England as in Russia. Desnitskiy was born only a few years after Thomas Paine.⁸⁶

V. S. Solovyev (1853–1900) was the next Russian to think deeply about issues of rights. He, like Radishchev, was not a lawyer, and his approach, while committed to enlightenment values, had a specifically religious focus to it. This spiritual, idealistic dimension to Russian rights discourse is characteristic and a specific and unique contribution. B. N. Chicherin (1828–1904) was the first lawyer to work through issues of liberalism in connection with law and rights. He argued for a constitutional monarchy and strong state, and strongly opposed Aleksandr Gertsen (Hertzen to us) – a writer who spent much of his life in exile in England. He did, however, draw on both Russian and European experience and traditions. Another lawyer, P. I. Novgorodtsev (1866–1924), was the chief exponent of a natural law, Kantian approach to questions of the relationship between the individual and law. He too was strongly influenced by the Russian spiritual heritage. One of the latest proponents of this trend was N. A. Berdyaev (1874–1948), a member of the *Vekhi* group, whose manifesto collection of articles appeared in 1909⁸⁷, attracting the strongest criticism from Marxists and liberals alike.

⁸⁵ William Butler (1999) *Russian Law* (Oxford: Oxford University Press), pp.24–25 and 52–53; and Archie Brown (1977) “The Father of Russian Jurisprudence: The Legal Thought of S. E. Desnitskii” in W. Butler (ed.) *Russian Law: Historical and Political Perspectives* (Oxford: Oxford University Press) pp. 117–42

⁸⁶ Paine left England for the American colonies in 1774, and began writing his extraordinarily influential *Common Sense* in 1775. Its publication in 1776 was a sensation, selling at least 100,000 copies in that year alone. Its content was entirely unacceptable to the English ruling elite. His *Rights of Man* appeared in 1791, and he was forced to leave England, remaining in France for 10 years – he was imprisoned in 1793 after war broke out between England and France.

⁸⁷ *Vekhi. Sbornik statei o russkoi intelligentsiya*. (Landmarks: Articles on the Russian intelligentsia). Paperback edition, Azbuja, Avalon, St Petersburg 2011

For Berdyaev, inalienable human rights were the form of expression and existence on earth (Caesar's kingdom) of personal freedom, that is of the transcendental (and godlike) phenomena of the kingdom of Spirit. In his book *Gosudarstvo. Vlast i pravo. Iz istorii russkoi pravovoi mysli* (The State. Power and law. From the history of Russian legal thought), Berdyaev wrote "The declaration of the rights of God and the declaration of human rights are one and the same declaration."

The point I wish to make by way of this brief survey is that there is a distinctively Russian approach to and thought about human rights which repays careful study by Western scholars. These are thinkers of the first rank. Moreover, the account above is sufficient to show that while it is possible to speak of Russian culture, and even of Russian legal culture, it would be a grave mistake to ignore the complex and dynamic interplay of Russian and Western European – especially Scottish! – histories and traditions.

Conclusion

I insist, as I have done in a number of publications⁸⁸, that Russia's unexpected accession to the CoE, established as the CoE was as an ideological opponent of the USSR and its allies, and its ratification of the ECHR, did not at all represent the transplantation of alien concepts and mechanisms into hostile Russian soil, but rather a restoration of reforms adopted in the 19th century, as the result of the interaction between Russia and Western Europe, especially Scotland, in the 18th century. It is in this context that the discourse of international law, more particularly human rights law, between Russia and the CoE since 1996 must be understood. Russia is as much a Christian, and increasingly a Muslim, country as any Western European state, and has a rich history not only of legal and judicial reform but of intellectual contest concerning rights.

11,472 words, including footnotes

⁸⁸ See in particular Bill Bowring *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Routledge, 2013); also Bill Bowring "Russian cases in the ECtHR and the question of implementation" in Lauri Mälksoo and Wolfgang Benedek (eds) *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge, Cambridge University Press, 2017), pp.188-221